STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2012
v	No. 302799 Calhoun Circuit Court
DARELLEE DOMINIQUE GORDON, Defendant-Appellant.	LC No. 2010-002909-FC

Before: OWENS, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of second-degree murder, MCL 750.317; felon in possession of a firearm, MCL 750.224f; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced him as an habitual offender, second offense, MCL 769.10, to concurrent terms of 35 to 70 years' imprisonment for second-degree murder and 36 to 90 months' imprisonment for felon in possession of a firearm. Defendant also received terms of two years' imprisonment for each of the felony-firearm convictions, to run consecutively to their underlying respective felonies. We affirm.

This case stems from a dispute that ultimately led to a shooting resulting in the victim's death. Defendant's fingerprint was found on the murder weapon. Shortly after the shooting, defendant was stopped by police and taken into custody. Two other individuals, Rommell Bolden and Caleb Hampton, were in the stopped vehicle with defendant.

Defendant first argues that his trial counsel was ineffective in failing to file a motion in limine before trial to exclude evidence of defendant's gang affiliation. Defendant also argues that his trial counsel should have objected to the prosecutor's question regarding this issue. Because this issue was not preserved, "review is limited to errors apparent on the record." *People v Seals*, 285 Mich App 1, 20; 776 NW2d 314 (2009). "The determination whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *Id*. at 17 (citation omitted). To prove ineffective assistance of counsel, a defendant must demonstrate that: (1) his counsel's performance fell below an objective standard of reasonableness, (2) it is reasonably probable that the result of the proceeding would have been different but for counsel's alleged error, and (3) the

result was fundamentally unfair or unreliable. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defendant's trial counsel repeatedly mentioned gang affiliations as part of the theory of defense that defendant drove two gang members during the incident and was being blamed by them, but did not participate in the shootings. Because defendant's trial counsel raised gang affiliation as part of the defense theory, defendant's trial counsel could not have made a valid objection to the prosecutor's later questioning regarding defendant's known gang affiliation. The prosecutor's question was properly responsive to defendant's theory of the case. See, generally, *People v Figgures*, 451 Mich 390, 399-400; 547 NW2d 673 (1996). In addition, we note that decisions regarding what pretrial motions to file are a matter of trial strategy. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). There is nothing in the record to support the argument that defendant's attorney was deficient for failing to file a motion to exclude evidence of defendant's gang affiliation before trial and, because our "review is limited to errors apparent on the record," the argument fails. *Seals*, 285 Mich App at 20.

To the extent defendant's argument challenges counsel's trial strategy in introducing evidence of gang affiliation, decisions regarding "what evidence to present" are also a matter of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). This Court "will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Just because a trial strategy selected by trial counsel does not work does not mean trial counsel was ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). We find that defendant has failed to overcome the presumption that his trial counsel was effective. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant next argues that there was insufficient evidence to support his conviction for second-degree murder. Defendant argues that because he was acquitted of the charge of intentional discharge of a firearm from a motor vehicle (IDFMV), MCL 750.234a, the jury must not have believed he was the shooter.

We first note that we do not find defendant's conviction improper based on its being inconsistent with the jury's acquittal on the IDFMV charge. The jury could have believed defendant was not the shooter and convicted him on the second-degree murder charge as an aider and abettor. Moreover, even assuming the jury's verdict was inconsistent, "[a] jury in a criminal case may reach different conclusions concerning an identical element of two different offenses." *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994) (emphasis removed). "[A] jury may reach inconsistent verdicts as a result of mistake, compromise, or leniency." *Id*. at 597-598.

There was sufficient evidence to convict defendant of second-degree murder. The elements of second-degree murder are: "(1) death, (2) caused by defendant's act, (3) with malice, and (4) without justification." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003); MCL 750.317. "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). In analyzing a sufficiency of the evidence claim, this Court views the

"evidence in a light most favorable to the prosecution . . . ." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Viewed in the light most favorable to the prosecution, the evidence showed that defendant was angry that someone threw a bottle at his vehicle, he returned to the scene of the throwing, and Hampton retrieved guns from the trunk of the car. Based on the circumstantial evidence that defendant's fingerprint was the only one found on the murder weapon, the jury could have reasonably inferred that defendant recklessly fired the murder weapon in a manner that resulted in the victim's being hit with a bullet from a gun defendant fired, resulting in the victim's death. Thus, a rational trier of fact could have found that all the elements of second degree murder were "proved beyond a reasonable doubt." *People v Phelps*, 288 Mich App 123, 132; 791 NW2d 732 (2010). In the alternative, defendant could have been convicted as an aider and abettor if the jury concluded that (1) he drove Bolden and Hampton to the scene and opened the trunk or, at the least, stopped the car in order to allow the guns to be retrieved; (2) shots were thereafter fired; and (3) he helped the shooter flee the scene. *People v Bulls*, 262 Mich App 618, 625; 687 NW2d 159 (2004). The latter fact can be inferred from the fact that the murder weapon was transported away from the scene of the murder in the car defendant was driving.[1]

Defendant raises a number of issues in his Standard 4 brief on appeal. Defendant argues that his trial counsel was ineffective on various grounds. As noted above, because this issue was not preserved, "review is limited to errors apparent on the record." *Seals*, 285 Mich App at 20. The burden is on defendant to establish "the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant first argues that his trial counsel failed to properly investigate his case. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *Id*. While defendant asserts that his trial counsel should have met with certain witnesses, defendant's argument is predicated entirely on facts not in the record, and, as noted, the burden is on defendant to establish the factual predicate for his claims of ineffective assistance. *Hoag*, 460 Mich at 6. Because review of defendant's ineffective-assistance claims is limited to mistakes apparent on the record, and no mistakes are apparent from the record, defendant has not met his

[1] Given the circumstances surrounding the shooting, there was sufficient evidence of the requisite mens rea under either the aiding-and-abetting or direct-perpetrator theory. See, e.g., *Aldrich*, 246 Mich App at 123 ("[m]alice for second-degree murder can be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm") (internal citation and quotation marks omitted); *People v Robinson*, 475 Mich 1, 14-15; 715 NW2d 44 (2006) (discussing mens rea in the context of aiding and abetting).

burden of showing that defense counsel's performance fell below an objective standard of reasonableness. *Frazier*, 478 Mich at 243.

Defendant next argues that defense counsel was ineffective for failing to call certain witnesses. The decision regarding what witnesses to call is a matter of trial strategy, *Horn*, 279 Mich App at 39, and we "will not second-guess [matters of trial strategy] with the benefit of hindsight," *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant's arguments pertaining to these witnesses rely solely on evidence that is not part of the record. Defendant has not met his burden of showing that defense counsel's performance on the record fell below an objective standard of reasonableness. *Frazier*, 478 Mich at 243.

Defendant next argues that his trial counsel was ineffective in failing to let defendant testify. "A defendant's right to testify in his own defense arises from the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution." *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). "[A]n accused's decision to testify or not to testify is a strategic decision best left to an accused and his counsel." *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). As noted, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). While there is nothing in the record relating to defendant's interest in testifying or not testifying, there is "no requirement in Michigan that there be an on-the-record waiver of a defendant's right to testify." *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991). Defendant argues that his trial counsel refused to let him testify because counsel was allegedly unprepared for this circumstance, but there is nothing in the record to support this claim. Defendant has failed to establish the factual predicate for his claim. *Hoag*, 460 Mich at 6. Consequently, defendant has not met his burden of demonstrating that defense counsel was ineffective.

Defendant next argues that his trial counsel was ineffective for failing to object to the aiding and abetting instruction. "An aiding and abetting instruction is proper where there is evidence that (1) more than one person was involved in the commission of a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing." *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995). In the present case, the jury could have found that defendant aided and abetted one of the other individuals in the vehicle, if it found that either Bolden or Hampton was the shooter. There was evidence from which the jury could have concluded that defendant drove the shooter to the scene; remotely opened the trunk or, at the least, stopped the car in order to allow the guns to be retrieved; and helped the shooter flee the scene. "'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime . . . ." *Bulls*, 262 Mich App at 625 (internal citations and quotation marks omitted). Because the instruction was proper, defense counsel could not have

made a meritorious objection. "Counsel is not required to raise meritless or futile objections . . . ." *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).[2]

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Patrick M. Meter

[2] Defendant also implies that his trial counsel was ineffective for failing to request a duress instruction. Defendant has failed to properly present this argument because it was not raised in the statement of questions presented for appeal. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). In addition, the briefing relating to it is inadequate. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Therefore, we decline to consider it. *Id*. (discussing abandonment of an issue); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).